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 UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

UNITED STATES of AMERICA for the Use  
 and Benefit of WEBCOR CONSTRUCTION,  
 INC. dba WEBCOR BUILDERS, and  
 WEBCOR CONSTRUCTION, INC. dba  
 WEBCOR BUILDERS,

Plaintiffs,

vs.

DICK/MORGANTI, a joint venture; DICK  
 CORPORATION; THE MORGANTI  
 GROUP; AMERICAN CASUALTY  
 COMPANY OF READING, PA;  
 NATIONAL UNION FIRE INSURANCE  
 COMPANY OF PITTSBURGH, PA, and  
 DOES 1 through 10, inclusive,

Defendants.

Case No.: 3:07-CV-02564-CRB

**DECLARATION OF MICHAEL T.  
 AMBROSO IN SUPPORT OF REPLY TO  
 OPPOSITION TO MOTION TO STAY  
 PROCEEDINGS**

DECLARATION OF MICHAEL T. AMBROSO IN SUPPORT OF REPLY  
 TO OPPOSITION TO MOTION TO STAY PROCEEDINGS

Case No.: 3:07-CV-02564-CRB

49806.01

1 AND ALL RELATED COUNTER-CLAIMS  
2 AND THIRD PARTY COMPLAINTS.  
3

4 I, Michael T. Ambroso, declare as follows:

5 1. Unless otherwise indicated herein, the facts set forth below are personally known  
6 to me and if called upon I am willing and able to testify in support of these facts.

7 2. I am the Assistant General Counsel and Assistant Secretary for Defendant Dick  
8 Corporation. Dick Corporation is the managing partner of Defendant Dick/Morganti, A Joint  
9 Venture formed between Dick Corporation and Defendant Morganti Texas, Inc.  
10 Dick/Morganti's sureties for the construction project which is the subject matter of this lawsuit  
11 are Defendant American Casualty Company of Reading, PA ("American") and National Union  
12 Fire Insurance Company of Pittsburgh, PA ("National").

13 3. I have detailed knowledge of the construction project that gives rise to this action  
14 ("Project"), as well as detailed knowledge of Dick/Morganti's relationship with the owner of the  
15 Project, the General Services Administration of the United States Government ("GSA" or  
16 "Owner"). I also have detailed knowledge of Dick/Morganti's work with its subcontractors for  
17 the Project, including Plaintiff Webcor Construction, Inc. ("Webcor").

18 **BACKGROUND**

19 4. The Project was recently completed, and an official dedication ceremony for the  
20 building was held on July 9, 2007.

21 5. Webcor's scope of work for the Project included providing the materials and labor  
22 for the placement and finishing of the concrete portions of the Project, including the foundation,  
23 structural beams, walls and floors.

24 6. I have read Webcor's August 3, 2007 Opposition to Motion to Stay Proceedings  
25 ("Opposition"). I have also read the Declaration of Kenneth G. Jones, Esq. ("Jones Dec.") and  
26 the exhibits thereto and the Declaration of Jack Harrington ("Harrington Dec.") and the exhibits  
27 thereto which were filed in support of Webcor's Opposition.

28 ///

7. I have detailed knowledge of the facts, circumstances, and documents related to Webcor's work for the Project, including the issues and assertions raised in Webcor's Opposition, the Jones Dec., and the Harrington Dec.

#### **THE TIMELINE RELEVANT TO WEBCOR'S COR 60**

8. Throughout the course of the Project Webcor submitted change order requests ("COR's") seeking increases in the compensation and/or time for completing Webcor's work. Webcor's largest COR was COR 60, which originally sought an increase of \$5,221,053 in amounts due Webcor, and also requested a schedule extension of 209 days for Webcor's work. (See Exhibit A to Harrington Dec.)

9. COR 60 involves complex issues related to the plans and specifications for the Project, including the design and placement of rebar in the foundation and supporting beams and walls for this 18-story building. (Furnishing and installing the rebar was performed by another subcontractor of Dick/Morganti, with Webcor then installing the forms and placing and finishing the concrete.) COR 60 also involves complex issues related to the finish on the open, exposed surfaces of some of the concrete provided by Webcor.

10. Webcor submitted COR 60 to Dick/Morganti on or about June 29, 2005 and requested that Dick/Morganti, as the general contractor having the contract with the Owner, submit it to the GSA. A true and correct copy of Webcor's June 29, 2005 submittal of COR 60 is attached hereto as **Exhibit A**.

11. Within 10 days of receiving COR 60 from Webcor, Dick/Morganti submitted it to the GSA on July 8, 2005. (For numbering purposes between Dick/Morganti and the GSA, Dick/Morganti numbered this COR as "Change Order Request No. GSA 182." This COR is also labeled as Dick/Morganti Issue 364.) A true and correct copy of Dick/Morganti's July 8, 2005 submittal of COR 60 to the GSA is attached hereto as **Exhibit B**.

12. The GSA did not respond to Dick/Morganti's submittal of COR 60, despite numerous prompts and requests by Dick/Morganti to the GSA as to the status of the GSA review, until the GSA rejected COR 60 in a letter dated October 10, 2006. A true and correct copy of the GSA's rejection letter regarding COR 60 is attached hereto as **Exhibit C**.

1           13.     Dick/Morganti received the GSA's rejection letter at the Project site, and one of  
 2     Dick/Morganti's attorneys, Joel Heusinger, forwarded the rejection letter to counsel for Webcor  
 3     on October 27, 2006. A true and correct copy of Mr. Heusinger's cover letter to Webcor  
 4     enclosing the GSA's rejection is attached hereto as **Exhibit D**.

5           14.     After the GSA's October 10, 2006 rejection of Webcor's COR 60, Dick/Morganti  
 6     and Webcor took steps to prepare and submit this COR as a formal, certified "Claim" to the  
 7     GSA's Contracting Officer. The requirements for a formal Claim for the Project are set forth in  
 8     the Disputes provision of Dick/Morganti's General Contract with the GSA and Federal  
 9     Acquisition Regulation ("FAR") 52.233-1. A true and correct copy of the Disputes provision  
 10    from the General Contract is attached hereto as **Exhibit E**.

11          15.     Because Webcor is bound by the terms of the General Contract, including the  
 12    certification requirement of the Disputes provision, Dick/Morganti informed Webcor that it must  
 13    certify that COR 60 is made in good faith and that the supporting data was accurate and  
 14    complete. (See Exhibit E, FAR 52.233-1(d)(2)(iii).)

15          16.     As set forth in Mr. Heusinger's October 27, 2006 letter, and as the Project was  
 16    nearing its final stages, Dick/Morganti was in the process of preparing its overall claim to the  
 17    GSA which seeks additional compensation for Dick/Morganti and its subcontractors for the total  
 18    increased costs and additional time for completing the Project (the "Global Claim").

19          17.     Webcor's COR 60, as well as Webcor's COR's 61-65, involve complex issues  
 20    related to impacts to the Project schedule, including impacts to the sequence of work done by  
 21    other subcontractors and overall delays to the Project's final completion. As such, the events  
 22    identified in Webcor's COR's are closely related to the delays and impacts experienced by  
 23    Dick/Morganti and the other subcontractors on the Project, and to the claims those entities have  
 24    been and will be asserting.

25          18.     The claims by Dick/Morganti's other subcontractors that are related to the events  
 26    identified in Webcor's COR's 60-65 include components for delays, re-sequenced work, trade  
 27    stacking, labor inefficiency, price escalation for labor and materials, and competing time for time  
 28    for use of the Project cranes, among other things. To date, the trade subcontractors making

1 claims related to the events identified in Webcor's COR's include, but are not limited to, the  
2 electrician, the interior wall and panel installer, and the door and hardware installer.

3 19. Because of the magnitude of the events identified in COR 60 and their impact on  
4 Dick/Morganti's analysis and preparation of the Global Claim, officials from Dick/Morganti and  
5 Webcor have worked together to make sure that Webcor's claim was and is consistent with the  
6 Global Claim. This work includes direct consultation between the separate scheduling  
7 consultants retained by Dick/Morganti and Webcor, including consultation between one of  
8 Dick/Morganti's consultants, Rex Snyder, and Webcor's consultant, Dan Kass, after the GSA's  
9 rejection of COR 60.

10 20. As stated above in paragraph 8, Webcor's COR 60 originally sought damages of  
11 \$5,221,053 and requested a schedule extension of 209 days. Webcor's revised version of COR  
12 60, which was accompanied by Webcor's proposed certification language, reduced Webcor's  
13 total damages figure to \$4,671,740 and reduced Webcor's time extension request to 182 days.  
14 Webcor submitted this revised version of COR 60 and its proposed certification language to  
15 Dick/Morganti on or about March 23, 2007. A true and correct copy of the cover letter for  
16 Webcor's revised COR 60, Webcor's proposed certification language, and a summary of the  
17 revised version of COR 60 is attached hereto as **Exhibit F**.

18 21. Dick/Morganti, as the General Contractor, is also required to certify that any  
19 Claim submitted to the GSA (including any claim from its subcontractors) is made in good faith  
20 and is supported by accurate data. Thus, after receiving Webcor's revised version of COR 60 in  
21 late March 2007 and before certifying it and submitting it as a formal Claim to the GSA,  
22 Dick/Morganti conducted its own due diligence as to the supporting data for Webcor's COR 60.  
23 This was especially necessary given the fact that the total damages figure for COR 60 had been  
24 recently reduced by Webcor by approximately \$550,000 and Webcor's request for a time  
25 extension had gone down by 27 days. (Some of Webcor's damage components actually  
26 increased, therefore increasing the need for due diligence.) Additionally, because COR 60 is  
27 related to the Global Claim, Dick/Morganti had to assure that Webcor's COR 60 was consistent  
28



1 with the related claims by Dick/Morganti and other subcontractors. The Global Claim involves  
2 the analysis of approximately 2,000 itemized time and cost issues.

3 22. Dick/Morganti's due diligence upon receiving Webcor's revised claim included  
4 analysis of Webcor's entitlement issues by legal counsel and Dick/Morganti's consultants,  
5 analysis of Webcor's cost data by legal counsel and Dick/Morganti's consultants, and analysis of  
6 Webcor's schedule data and conclusions by Dick/Morganti's own schedule experts.

7 23. Also, after receiving revised COR 60 with Webcor's proposed certification  
8 language, Dick/Morganti and Webcor engaged in discussions regarding the proper language for  
9 Webcor's certification of its claim. The version of Webcor's certification attached to Webcor's  
10 March 23, 2007 cover letter, was not acceptable to Dick/Morganti because it did not comply with  
11 FAR 52.233-1(d)(2)(iii).

12 24. As Dick/Morganti's due diligence regarding Webcor's revised COR 60 was still  
13 ongoing, and before resolution of the issues related to the certification language, Webcor filed  
14 this lawsuit on May 15, 2007.

#### 15 THE JUNE 11, 2007 TELECONFERENCE

16 25. As referenced in paragraphs 11-12 of the Jones Dec., I participated in a  
17 teleconference on June 11, 2007 with John Bowles and Ken Jones (Webcor counsel). The  
18 subject matter of this teleconference was the submittal of Webcor's certified claim and how  
19 Webcor's recently filed lawsuit would be handled.

20 26. Mr. Jones' statement in paragraph 11 of his declaration that, in that  
21 teleconference, Dick/Morganti "...for the first time, agreed to pass up Webcor's claim regarding  
22 COR 60..." is inaccurate. On July 8, 2005, Dick/Morganti had already submitted Webcor's  
23 COR 60 as an uncertified claim to the GSA, and Dick/Morganti officials have informed Webcor  
24 on numerous occasions of Dick/Morganti's intent to fully pursue Webcor's claims against the  
25 GSA in accordance with the Disputes provisions of the General Contract. (See, e.g., Exhibit D,  
26 paragraph 2.) On numerous occasions, Dick/Morganti had also informed Webcor that any  
27 Webcor claim to be submitted to the GSA would have to be certified in accordance with the  
28 applicable FAR requirements and that, in order to do so, Dick/Morganti would have to assure

1 itself that there was legal entitlement for the claim and that the damage figures were supported  
 2 by proper data. Further, Webcor had frequently been informed that its claims involve complex  
 3 schedule issues that are inherently related to the Global Claim.

4 27. Mr. Jones' statement that "...Webcor further informed counsel for DMJV that it  
 5 considered DMJV's breach material such that Webcor's further performance of any ADR or  
 6 dispute provisions was excused" is incorrect. Webcor has never, prior to the filing of the present  
 7 Opposition, asserted that Dick/Morganti breached its subcontract agreement so that Webcor was  
 8 somehow excused from its obligations under the Disputes provisions of the subcontract.

#### 9 **WEBCOR'S COR'S 61-65**

10 28. Webcor's COR's 61-65 involve disputes between Dick/Morganti and the GSA.  
 11 Specifically, each of these COR's involves time extension requests which form, in part, the basis  
 12 for the Global Claim. Dick/Morganti's position vis-à-vis the GSA is that the GSA is responsible  
 13 for the late start of the Project, weather delays, site access and staging issues caused by the GSA  
 14 and its agents, as well as the associated delays and extended performance periods related to the  
 15 tower cranes. Additionally, Dick/Morganti's schedule claims against the GSA relate to unknown  
 16 and unsuitable soil conditions, as well as crane usage on the Project, which impacted not only  
 17 Webcor, but numerous other subcontractors on the Project.

18 29. The dispute between Dick/Morganti and the GSA involves not only the number of  
 19 days of time extension to which Dick/Morganti is entitled, but also issues as to whether any  
 20 schedule extensions are compensable, or merely excusable but noncompensable. Webcor's  
 21 COR's 61-65 are being analyzed as part of the Global Claim that will be presented to the GSA.  
 22 It is necessary that Webcor participate in and provide further analysis of COR's 61-65 as it  
 23 relates to the Global Claim.

24 30. Dick/Morganti denies that "...DMJV has admitted that COR's 61-65 do not  
 25 involve any dispute between DMJV and the GSA...", as stated in paragraph 15 of the Jones Dec.

26 31. Dick/Morganti denies the assertions in paragraph 8 of the Harrington Dec.  
 27 wherein Mr. Harrington states that he was informed by Jim Dravet or Fred Daven that COR's  
 28 61-65 "...are not the GSA's responsibility, do not involve the GSA, will not be a part of the

1 formal FARS claims process and that DMJV will not pass COR's 61 to 65 through to the GSA."  
 2 Mr. Dravet and Mr. Daven were formerly Dick/Morganti's Project Manager and Project  
 3 Director, respectively, but neither Mr. Dravet nor Mr. Daven have worked at the Project for close  
 4 to two years, nor have either been employed by Dick/Morganti for over one year.  
 5 Dick/Morganti's position regarding Webcor's COR's 61-65, both currently and at the time  
 6 Mssrs. Dravet and Daven were involved in the Project, is that these COR's likely involve  
 7 disputes between Dick/Morganti and the GSA.

8 32. Contrary to any assertions by Mr. Jones or Mr. Harrington, there is a strong  
 9 likelihood that COR's 61-65 are legally and factually related to Dick/Morganti's claims against  
 10 the GSA, and resolution of the Global Claim is necessary prior to determining whether any  
 11 issues exist solely between Dick/Morganti and Webcor.

12  
 13 I declare under penalty of perjury under the laws of the State of California that the  
 14 foregoing is true and correct.

15  
 16 Executed this 10th day of August, 2007 at Pittsburgh, Pennsylvania.

17   
 18 Michael T. Ambroso